DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

JAN 19 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-98
Local Competition Provisions	)	
Of the Telecommunications Act of 1996	)	

COMMENTS OF CABLE & WIRELESS USA, INC.

Cable & Wireless USA, Inc. ("C&W USA"), by its attorneys, hereby submits the following comments in response to the Fourth Further Notice of Proposed Rulemaking in the above-captioned proceeding ("FNPRM"), as modified by the Supplemental Order released on November 24, 1999 ("Supplemental Order").[1] The FNPRM as modified seeks comment on whether there is any basis in the statute or the Commission's rules for restricting the ability of telecommunications carriers to obtain and use combinations of unbundled network elements ("UNEs"), and in particular the combination of the loop and transport UNEs known as the enhanced extended link ("EEL"), to provide any telecommunications service. In addition, the FNPRM as modified seeks comment on whether the Commission should continue to restrict telecommunications carriers from using certain UNEs solely for exchange access. C&W USA respectfully submits that the statute, as implemented by the Commission's rules, prohibits any and all restrictions on the ability of telecommunications carriers to use UNEs, either alone or in combinations, to provide exchange access or any other telecommunications services.

---

[1] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238 (rel. Nov. 5, 1999), *as modified by* Supplemental Order, CC Docket No. 96-98, FCC 99-370 (rel. Nov. 24, 1999). By Order released on January 7, 2000, the Common Carrier Bureau of the FCC extended the deadlines for filing

(continued...)

INTRODUCTION

C&W USA is a preeminent provider of Internet, data, and long distance services with ongoing plans to integrate and upgrade its networks in order to provide a full range of integrated, basic and advanced telecommunications services packages to consumers. As such, C&W USA is intensely interested in the outcome of this proceeding. C&W USA currently is in the midst of implementing a two-year plan to upgrade, enhance, and expand its network in order to maintain its status as a preeminent provider of a full range of advanced voice and data services. However, despite C&W USA's ongoing investments, C&W USA's ability to maintain and improve its market position will be limited if it does not have unrestricted access to UNEs, alone and in combinations, as mandated by the Telecommunications Act of 1996. Therefore, it is important to C&W USA that the Commission clarify that ILECs must provide the EEL without restriction from the customer's premises to a point of termination designated by the telecommunications carrier (either a collocation arrangement or a point of presence). Finally, as a long distance carrier, C&W USA is interested in being able to use any UNE, including local switching and shared transport, solely for exchange access, and the Commission should confirm that the statute entitles telecommunications carriers to do so.

(...continued)
comments and reply comments in this proceeding to January 19, 2000, and February 18, 2000, respectively. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Order Granting Extension of Time, CC Docket No. 96-98, DA 00-10 (rel. Jan. 7, 2000). These comments therefore are timely filed.

I. THERE IS NO BASIS UNDER THE 1996 ACT OR THE COMMISSION'S RULES PURSUANT TO WHICH AN ILEC COULD DECLINE TO PROVIDE ENTRANCE FACILITIES AT UNBUNDLED NETWORK PRICES

The 1996 Act prohibits all limitations on the use of UNEs, regardless whether certain uses have a greater financial impact on ILECs than others. Section 251(c)(3) of the 1996 Act imposes upon ILECs:

> The duty to provide, *to any requesting telecommunications carrier for the provision of a telecommunications service*, nondiscriminatory access to network elements on an unbundled basis *at any technically feasible point* on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements *in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.*[2]

Section 251(c)(3) does not authorize or permit any restrictions on the ability of telecommunications carriers to use UNEs alone or in combinations to provide the telecommunications services of their choice. Rather, Section 251(c)(3) unambiguously grants *any* "telecommunications carrier" the right to use *any* UNE to provide *any* "telecommunications service."

Use-based distinctions are not only inconsistent with the plain meaning of Section 251(c)(3), they are also incompatible with the fundamental nature of UNEs. The use-based distinctions proposed by the ILECs focus on the type of service the requesting carrier will use the UNE to provide. However, as the Commission has explained, "network elements are defined by

---

[2] 47 U.S.C. § 251(c)(3) (emphasis added).

facilities or functionalities or capabilities, and thus, cannot be defined as specific services."[3] When a carrier purchases a UNE from an ILEC, it is not purchasing an exchange service, an exchange access service or any other particular service.[4] Rather, the carrier is purchasing a facility, functionality or capability that it can use at its or its customers' discretion to provide any service the UNE is capable of supporting. This conclusion is compelled by the plain language of Section 251(c)(3), which requires ILECs to allow requesting carriers to purchase access to functionalities that can be used to provide a service either alone or when combined with other functionalities.

The Commission has likewise found that "Section 251(c)(3) does not impose any service-related restrictions or requirements on requesting carriers in connection with the use of unbundled elements,"[5] and, therefore, that ILECs "*may not impose restrictions upon the uses* to which requesting carriers put such network elements."[6] The Commission emphasized its finding by observing that "there is no statutory basis by which we could reach a different conclusion," because the statutory language is "not ambiguous."[7]

Based on its conclusion that the statutory language is "not ambiguous," the Commission adopted a number of regulations that prohibit ILECs from restricting in any manner the types of telecommunications services that requesting carriers can provide using UNEs. For example, Rule 51.307(c) requires ILECs to provide UNEs "in a manner that allows the

---

3 *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 264 (1996).

4 *See id.*, ¶ 358.

5 *See id.*, ¶ 264.

6 *See id.*, ¶ 27 (emphasis added).

7 *See id.*, ¶ 359 (emphasis added).

requesting telecommunications carrier to provide *any telecommunications service* that can be offered by means of that network element."[8] Moreover, Rule 51.309(a) prohibits ILECs from imposing any "limitations, restrictions, or requirements on . . . the use of unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in a manner the requesting carrier intends."[9] Finally, Rule 51.309(b) provides that a "telecommunications carrier purchasing access to an unbundled network element may use such network element to provide exchange access services to itself in order to provide interexchange services to subscribers."[10] The Commission correctly recognized that these rules are compelled by the unambiguous language of Section 251(c)(3), which grants the competitor, not the incumbent, the right to decide whether and in what manner it will use UNEs.

In sum, the Commission has already found both that the language of Section 251(c)(3) is unambiguous, and that it clearly prohibits all use-based restrictions. As such, it would be illogical and impermissible for the Commission now to find that the use-based restrictions urged by the ILECs can be regarded as "just and reasonable" terms and conditions of providing access to UNEs, and thus permitted by Section 251(c)(3). This conclusion remains the same regardless of the putative financial impact on ILECs caused by any particular use of any specific UNE or combination of UNEs.[11] Any other conclusion would lead to absurd results

---

8 47 C.F.R. § 51.307(c) (emphasis added).

9 47 C.F.R. § 51.309(a).

10 47 C.F.R. § 51.309(b).

11 C&W USA submits that given the changing competitive marketplace, the financial impact on the ILECs would not be excessive, particularly because revenue comparisons should not, and indeed cannot, be based on a simple comparison between the rates for special access and EELs. *See, e.g.,* Letter dated September 1, 1999 from Carol Ann Bischoff, CompTel, to Lawrence E. Strickling, FCC, at 9-13 (estimating the differential between special access and UNE rates).

because the 1996 Act would be eviscerated if the Commission had the authority to adopt rules that conflict with the plain meaning of the 1996 Act merely because their enforcement would have some financial impact on the ILECs.

Furthermore, C&W USA respectfully submits that the financial impact of the use of a UNE or combination of UNEs for exchange access, or any other type of service, will not exceed that contemplated by Section 251(c)(3) if the ILECs are complying with the rest of the 1996 Act and the Commission's Rules. The central goal of the 1996 Act is to promote competition in all telecommunications markets by expanding opportunities for new entrants to provide services to their customers.[12] With respect to the ILECs, the 1996 Act replaces guaranteed streams of revenue in certain markets with the opportunity to compete fairly in all markets, and thus necessarily contemplates a reallocation of ILEC revenue. Therefore, protecting ILEC revenue streams at the expense of competition simply in order to reduce the financial impact on ILECs is fundamentally inconsistent with the 1996 Act.

Similarly, the Commission could not rely on Section 154(i) standing alone to adopt a use-based restriction. It is well established that the Commission has no authority to promulgate regulations contrary to express statutory provisions.[13] Because the Commission has determined that Section 251(c)(3) mandates that interexchange carriers be allowed to purchase unbundled network elements in order to provide any telecommunications service, including

---

12 Pub. Law 104-104, 110 Stat. 56 (1996). *See* S. Conf. Rep. No. 104-230, 104th Cong. 1 (1996) (explaining that the 1996 Act erects a "procompetitive deregulatory national framework designed to accelerate rapid private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.").

13 *See* 47 U.S.C. § 154(i) (the Commission "may perform any and all acts . . . not inconsistent with this Act"); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 201 (continued...)

exchange access, it has no authority to rely on Section 154(i) by itself to adopt use-based restrictions. Finally, the Commission cannot forbear from applying Section 251(c)(3) in order to adopt a use-based restriction because Section 251 has not been fully implemented.[14]

Despite the complete lack of legal authority for use-based restrictions, the ILECs recently have sought to link their special access revenue stream to the social goal of universal service in order to create a policy justification for protecting their special access circuits from competition. However, the FCC previously has fully considered and rejected the claim that special access rates implicitly support universal service. For example, the Commission concluded in the *Expanded Interconnection* proceeding that any "contribution" contained in special access rates "should be targeted to recover only specifically identified regulatory support mechanisms or non-cost-based allocations" embedded within those rates.[15] In response to ILEC claims that special access rates were artificially inflated, the Commission examined the rates and removed the only support flow that it found:

> Based on the present record, the only significant non-cost-based support flow imposed by our regulations affecting special access is the over-allocation of General Support Facilities (GSF) costs to special access. . . . [W]e believe . . . it would be far more desirable to revise the Part 69 rules to allocate GSF costs proportionally to all services.[16]

(...continued)
(1956) ("§ 154(I) . . . grant[s] general rulemaking power not inconsistent with the Act or law").

14 *See* 47 U.S.C. § 160(d) ("[T]he Commission may not forbear from applying the requirements of section 251(c) . . . until it determines that those requirements have been fully implemented.).

15 *Expanded Interconnection with Local Telephone Company Facilities*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, ¶ 146 (1992), *subsequent history omitted.*

16 *Id.*, ¶¶ 147-48.

Although the Commission expressly invited the ILECs to propose contribution charges in its 1992 *Expanded Interconnection Order*,[17] none have ever done so. The Commission reached a similar conclusion in its *Universal Service* Proceeding, where it has not identified any implicit subsidies from ILECs' special access services. Therefore, it is specious for the ILECs, at this late date, to invent a universal service subsidy in their special access rates as a justification for use-based restrictions on UNEs. Such claims are a transparent effort to insulate their special access revenues from competitive pressures and the demands of compliance with the 1996 Act.

This new ILEC policy position is quite ironic since the ILECs in other proceedings have sought significant pricing flexibility for special access circuits based on allegations that they need to reduce their special access prices to meet competition. There is no reason why ILECs should be permitted to protect revenues from non-competitive markets, which can be used to subsidize special access circuits in competitive markets, and to respond to potential competition in other markets by implementing serious price reductions. Although ILECs should be able to compete fairly in competitive markets, ILECs should not be able to charge supra-competitive rates in markets where competition has yet to emerge.

II. CARRIERS HAVE THE RIGHT UNDER SECTION 251(c)(3) TO USE NETWORK ELEMENTS FOR THE PURPOSE OF PROVIDING EXCHANGE ACCESS

In the FNPRM, the Commission invites parties to refresh the record on whether requesting carriers may use UNEs, and in particular dedicated or shared transport facilities in conjunction with local switching, to originate or terminate interstate toll traffic to customers to

---

[17] *See id.*, ¶ 143 ("We will, however, permit the LECs to seek approval of a contribution charge based on other support flows.").

whom the requesting carrier does not provide local exchange service.[18] The plain meaning of Section 251(c)(3), as the Commission has recognized, "compel[s]" the conclusion that carriers may use any and all UNEs "for the purpose of providing exchange access to themselves in order to provide interexchange services to customers."[19] Even the ILECs concede that telecommunications carriers have the right to purchase UNEs at cost-based rates to "provide any telecommunications service," which unquestionably include exchange access.[20] As such, the Communications Act prohibits any restrictions on the use of UNEs for the provision of exchange access services for the ostensible purpose of avoiding adverse effects on the ILECs' switched access revenues.

Further, restrictions on the use of UNEs for exchange access are not necessary to promote universal service. Even should the Commission accept that the ILECs' interstate switched access revenues implicitly support universal service (a proposition which has never been proven and which C&W USA vigorously disputes), that cannot justify restrictions on telecommunications carriers' ability to use any UNE for exchange access. Congress directed in Section 254 that the Commission establish "explicit" universal service support mechanisms, hence prohibiting any attempt to bolster universal service through misguided use restrictions on specific UNEs. By permitting telecommunications carriers to use any and all UNEs to provide any telecommunications service (including exchange access), the Commission will promote lower access costs and lower retail rates to consumers.

---

18 *FNPRM*, ¶ 496, *citing Local Competition Third Reconsideration Order*, 12 FCC Rcd. at 12462, ¶ 3.

19 *First Local Competition Order*, 11 FCC Rcd at ¶ 356.

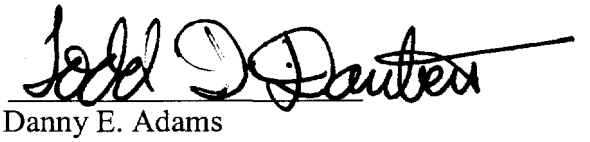
20 *See, e.g.,* Letter dated August 9, 1999 from William Barfield, BellSouth, to Lawrence Strickling, FCC, at 2 ("BellSouth *ex parte*"); Letter dated August 11, 1999 from Martin Grambow, SBC, to Lawrence Strickling, FCC, at 2 n.1 ("SBC *ex parte*").

Lastly, some telecommunications carriers and, increasingly, ILECs are seeking to provide long distance service as part of a service package including local and other services, and those carriers will be able to use UNEs for exchange access. It would arbitrarily skew competitive local and long distance market conditions to force telecommunications carriers who do not offer local services to customers – either because they have not yet been able to enter a particular local market, or because they choose not to – to pay higher exchange access costs simply because they do not offer local services to end-user subscribers. Such a restriction would benefit the largest carriers who already have developed the ability to offer one-stop-shopping packages, while serving as an entry barrier for smaller firms or new entrants who desire to provide long distance services on a stand-alone basis or packaged with services other than local service.

CONCLUSION

In sum, C&W USA urges the Commission to clarify that the statute prohibits any use restrictions on the ability of telecommunications carriers to use UNEs, either by themselves or in combinations such as EELs, to provide any telecommunications service.

Respectfully submitted,

By: 

Rachel J. Rothstein
Brent M. Olson
CABLE &WIRELESS USA, INC.
8219 Leesburg Pike
Vienna, VA 22182
(703) 760-3865

Danny E. Adams
Todd D. Daubert
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
(202) 955-9600

January 19, 2000

Its Attorneys

CERTIFICATE OF SERVICE

I , Tracey Sorenson, do hereby certify that on this 19th day of January, 2000, a copy of the foregoing was served, by the method so described, to the parties listed below:

Magalie Roman Salas, Secretary
Federal Communications Commission
12th Street Lobby, TW-A325
Portals II
445 Twelfth Street, S.W.
Washington, D.C. 20554
(by Courier)

Ms. Jodie Donovan-May
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554
(by Courier)

Lawrence E. Strickling
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(by Courier)

Ms. Linda Kinney
Office of Commissioner Ness
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(by Courier)

Mr. Jake E. Jennings
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(by Courier)

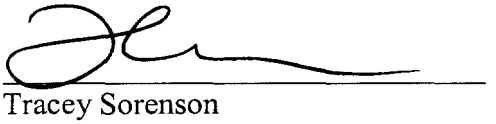
Mr. William Bailey
Office of Commissioner Furchtgott-Roth
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(by Courier)

Mr. Robert Atkinson
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(by Courier)

Mr. Kyle Dixon
Office of Commissioner Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(by Courier)

Ms. Dorothy Attwood
Office of Commissioner Kennard
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(by Courier)

Ms. Sarah Whitesell
Office of Commissioner Tristani
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(by Courier)



Tracey Sorenson